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The legislature by this act has provided parties with a method of settling their present or future controversies by arbitration under their own written agreements. With thoughtful and clear drafting, and a sincere intention by all parties to avoid litigation and to solve their controversies amicably, this act can be expected to greatly reduce litigation in civil controversies; to facilitate settlement of disputes involving only nominal amounts; and to obviate much of the delay, worry, expense and hard feelings which so often accompany litigation.<sup>42</sup>

<sup>42</sup> In Washington, the services of the American Arbitration Association are available to parties desiring to arbitrate. It is a non-partisan, non-political, non-profit-making organization, which will furnish upon request and for a nominal sum a panel of arbitrators composed of local professional and business men who volunteer their services. It has also established a set of rules governing the mechanics of arbitration which parties may include in their written contracts.

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## INJURY BY ACCIDENTAL MEANS AND THE EFFECT OF DISEASE IN ACCIDENT INSURANCE POLICIES

JENNINGS P. FELIX

### I.

#### INTRODUCTION

A troublesome problem in the field of accident insurance is the interpretation of the phrase "by accidental means" and the effect of pre-existing disease upon a case involving this interpretation. The decisions vary, not only from state to state but often within the same jurisdiction. This confused state<sup>1</sup> of case law results from the innumerable variety of fact patterns considered; and is due, in part, to the well-recognized sympathy of jurors toward widows and orphans who comprise the largest class of beneficiaries. The cases exemplify two main views, each supported by considerable authority.<sup>2</sup> Excluding the factor of disease, the principal rules deducible from the cases are:

(1) The apparent majority view,<sup>3</sup> that if the injury or death is the result of the voluntary act of the insured, done in the manner intended and unaccompanied by any unforeseen accidental cause, the injury or death is not by accidental means;<sup>4</sup> and

<sup>1</sup> VANCE, *INSURANCE* (2d ed. 1930) 868, § 257.

<sup>2</sup> 5 COUCH, *CYCLOPEDIA OF INSURANCE LAW* (1929) 868, § 1145.

<sup>3</sup> *Id.* at 4022.

<sup>4</sup> VANCE, *op. cit.* *supra* note 1, at 871.

(2) the minority rule, that where injury or death is unforeseen, unexpected, and without design, and is not such as results naturally from the voluntary and intentional act, but rather constitutes an unusual result, it may be said that it results from accidental means.<sup>5</sup>

The Washington position is now in line with the majority as the result of the recent decision in *Evans v. Metro. Life Ins. Co. et al.*<sup>6</sup> The decision in this case overruled holdings in two prior cases<sup>7</sup> by which the Washington court had subscribed to the minority view. In the *Evans* case, the widow of the insured, as beneficiary, brought suits on three policies of accident insurance against three insurers. The three policies were worded similarly<sup>8</sup> and the suits were consolidated for trial. The policy with the Metropolitan Insurance Company provided for double indemnity in case death occurred, "as the result, directly and independently of all other causes, of bodily injuries sustained through external, violent and accidental means and death shall not have been the result of self-destruction, whether sane or insane, or caused by, or contributed to directly or indirectly, or wholly or partially, by disease, or by bodily or mental infirmity"<sup>9</sup> The insured collapsed and died after pushing his 1941 Buick sedan an approximate total of fifty feet, part of which was slightly up grade over the crown of an intersecting street. He was a man of sixty-one, in apparent good health and of normal height and weight. He was accustomed to performing the usual duties about his house, which consisted chiefly of mowing the lawn, and to walking up several flights of stairs to his office. The autopsy revealed that the cause of death was "coro-

<sup>5</sup> See cases cited in 45 C. J. S., INSURANCE (1946) 111, § 753.

<sup>6</sup> 126 Wash. Dec. 557, 174 P.(2d) 961 (1946)

<sup>7</sup> *Horsefall v. Pac. Mut. Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028 (1903), *Bennett v. Mut. Trust Life Ins. Co.*, 21 Wn.(2d) 698, 152 P (2d) 713 (1944)

<sup>8</sup> Policy No. 2, INDUSTRIAL POLICY ACCIDENTAL DEATH BENEFIT, "upon due proof that the insured has sustained bodily injuries, solely through external violent and accidental means, resulting directly and independently of all other causes."

Policy No. 3, TRAVELER'S INS. CO., "against loss resulting directly and independently of all other causes from bodily injuries sustained during the term of this policy and effected solely through accidental means. The insurance shall not cover hernia, nor shall it cover accident injury, death, disability or other loss caused directly or indirectly, wholly or partially, by bacterial infections except through an accidental cut or wound, or by any other kind of disease."

<sup>9</sup> *Evans v. Metro. Life Ins. Co., et al.*, 126 Wash. Dec. 557, 559, 174 P (2d) 961, 964 (1946), cited *supra* note 6. Note that a policy may cover death by accidental means, death or injury by accidental means, or merely injury alone.

nary thrombosis due to arteriosclerosis";<sup>10</sup> that the left coronary vessels which supply the heart itself were much thickened and the openings "very, very small,"<sup>11</sup> compared with the normal heart; and that this was a condition of long standing. The medical witnesses testified that such exertion by a person with a heart in such condition would probably cause death and that the same exertion by a man with a normal heart would not.<sup>12</sup> Trial before a jury in the lower court resulted in a decision for the plaintiff, but this was reversed and dismissed, three judges dissenting. This case presents a clear factual pattern for the application of the majority rule; but it gives little hint as to how far the Washington court is willing to go in applying the rule to more indistinct factual situations.

In order adequately to examine the problem, it is necessary that the terms used in these policies be defined. "Accident," "accidental" and "accidental means" are peculiarly uncertain of definition since their meaning depends upon their application to the facts of each individual case.<sup>13</sup> The base word, "accident," connotes in popular usage a happening by chance, not according to the usual run of things, or not as expected.<sup>14</sup> While, strictly speaking, an event may be accidental only when dissociated from any human agency, such interpretation is not recognized in the law of accidental insurance.<sup>15</sup> Such words, in absence of express statute<sup>16</sup> or contract,<sup>17</sup> are given their ordinary, popular meaning.<sup>18</sup> It is held that there should be no attempt to interpret them

<sup>10</sup> Certificate of death by J. W. Mattson, M.D.

<sup>11</sup> *Evans v. Metro. Life Ins. Co., et al.*, 126 Wash. Dec. 557, 562, 174 P (2d) 961, 965 (1946) Testimony at trial by Dr. Edwin W. Janes, who reviewed the autopsy at the request of the respondent.

<sup>12</sup> *Id.* at 563.

<sup>13</sup> *VANCE, op. cit. supra* note 1, at 870.

<sup>14</sup> *United States Mut. Accident Ass'n v. Barry*, 131 U. S. 100, 33 L. ed. 60 9 Sup. Ct. 755 (1889) See also BLACK'S LAW DICTIONARY. *Evans v. Metro Life Ins. Co., et al.*, 126 Wash. Dec. 557, 583, 174 P (2d) 961 (1946), cited *supra* note 6. "The conclusion we must reach from a consideration of the cited cases is that accident is never present when a deliberate act is performed unless some additional, unexpected, independent, and unforeseen happening occurs which produces or brings about the result of injury or death."

<sup>15</sup> *Grovernor v. Fidelity & Casualty Co.* 102 Neb. 629, 168 N. W. 596 (1918)

<sup>16</sup> Apparently the only statute of this kind is in Ontario. ONT. REV. STAT. (1914), c. 183, § 172, "Bodily injuries are within an accident policy if they happened without the direct intent of the insured, or as the result of an intentional act, if such act did not amount to voluntary or negligent exposure to unnecessary danger."

<sup>17</sup> *Railway Mail Ass'n v. Mosely*, 211 Fed. 1 (C. C. A. 6th, 1914)

<sup>18</sup> *Ripley v. Ry. Passengers Assur. Co.*, 83 U. S. 336, 21 L. ed. 469 (1873), U. S.

in any technical sense.<sup>19</sup> Any means coming from outside the body of the insured which causes injury is within the definition of "external,"<sup>20</sup> while the requirement that the means be "violent" may be fulfilled by any force, however slight.<sup>21</sup> "Means," as used in the policy, is synonymous with "causes,"<sup>22</sup> thus "external, violent and accidental means" apply to the cause of the injury and not to the injury itself.<sup>23</sup> If they are used in the disjunctive, *i.e.*, "external, violent *or* accidental means," either violent or external means would be sufficient.<sup>24</sup> Such terms were added by the insurer for the purpose of limiting the risk defined by "accidental means," but their inclusion has had little if any influence on its construction by most courts.

"Bodily injury" is construed as excluding disability caused by disease.<sup>25</sup> "Disease" is interpreted to mean a sickness or ailment of a significant or settled character; it does not refer to a temporary or passing disorder.<sup>26</sup> It seems that the inclusion of disease as an exception to the contract coverage is an attempt to do away with the rule of proximate cause, in order to exempt the insurer from liability in case disease contributes in any way whatsoever to the death or injury. The courts have not favored this attempt, and hold uniformly that the means must be the proximate rather than the sole cause of the resultant injury or death, and that a total absence of latent contribut-

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Mut. Accident Ass'n v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. 755 (1889), cited *supra* note 14.

<sup>19</sup> Kane v. Order of United Commercial Travelers, 3 Wn. (2d) 355, 100 P (2d) 1036 (1940).

<sup>20</sup> 45 C. J. S., INSURANCE (1946) 784, § 755.

<sup>21</sup> Paul v. Travelers Ins. Co., 112 N. Y. 472, 20 N. E. 347 (1889)

<sup>22</sup> Bjorklund v. Continental Cas. Co., 161 Wash. 340, 297 Pac. 155 (1931); Pope v. Businessmen's Assur. Co. of Amer., 235 Mo. App. 263, 131 S. W. (2d) 887 (1939)

<sup>23</sup> *Ibid.*

<sup>24</sup> Okla. Nat. Life Ins. Co. v. Norton, 44 Okla. 783, 145 Pac. 1138, L. R. A. 1915E, 695 (1915). "The words 'or' and 'and' in a provision making the insurer liable where the injury is effected exclusively by external, violent and (or) accidental means, resulting in death, cannot be treated as interchangeable, so as to create a liability only where death results from external and violent means which are also accidental."

<sup>25</sup> Jensma v. Sun Life Assur. Co. of Canada, 64 F. (2d) 457 (C. C. A. 9th, 1933), cert. denied in Sun Life Assur. Co. of Canada v. Jensma, 289 U. S. 763, 77 L. ed. 1505, 53 Sup. Ct. 795 (1933); 1 APPLEMAN, INSURANCE LAW AND PRACTICE (1941) 473, § 393.

<sup>26</sup> U. S. Fidelity & Guaranty Co. v. Blum, 270 Fed. 946 (C. C. A. 9th, 1921) (Wash.); Browning v. Equitable Life Assur. Soc. of U. S., 94 Utah 570, 80 P (2d) 348 (1938)

ing causes will not be required.<sup>27</sup>

In order thoroughly to examine the problem presented by fact situations similar to the *Evans* case, it is necessary first to distinguish and analyze separately the factors of:

(1) the type of means, accidental or otherwise, which cause the death or injury This embodies two further considerations:

(a) whether the element to be examined is the cause, or the result itself; and

(b) whether the element is really accidental,

(2) the element of pre-existing disease.

It is then necessary to combine (1) and (2) in order to discover the effect, if any, of each one upon the other.

## II.

### CLASSIFICATIONS OF MEANS, ACCIDENTAL OR OTHER, WHICH CAUSE THE DEATH OR INJURY

(a) Of the preceding factors, (1-a) is entirely a question of law and marks the point of divergence between the majority and minority views. These views now merit further examination. The minority rule tests the accidental character of a means by its effects and holds that accidental means are those which produce effects that are not natural and probable consequences.<sup>28</sup> Thus, any unexpected result is deemed to have been effected by accidental means. By the usual rationale, there is no distinction in ordinary speech between accidental means and accidental result, and thus the reviewing court will find none.<sup>29</sup> This approach not only does violence to the express terms of the policy-contract,<sup>30</sup> but is unsupportable when viewed in conjunction with another rule applied by majority and minority courts alike: If the result is such that it follows from ordinary means voluntarily employed in a manner that is not unusual, it cannot be called a result effected by accidental means, even though the result is unforeseen and unintended.<sup>31</sup> This rule has been followed without question in

<sup>27</sup> *Evans v. Metro. Life Ins. Co., et al.*, 126 Wash. Dec. 557, 584, 174 P (2d) 961, 977 (1946) and cited cases.

<sup>28</sup> 6 COOLEY'S BRIEFS ON INSURANCE (2d ed. 1905) 5234.

<sup>29</sup> *Denton v. Traveler's Ins. Co.*, 25 Fed. Supp. 556 (D. C. Md. 1938)

<sup>30</sup> See note 9 *supra*.

<sup>31</sup> The rule was first laid down by Mr. Justice Blatchford in the leading Supreme Court case on this matter. *U. S. Mut. Accident Ass'n v. Barry*, 131 U. S. 100, 33 L. ed. 69, 9 Sup. Ct. 755 (1889), cited *supra* note 14.

Washington.<sup>32</sup> "Ordinary means," as used by the courts, denotes the type of acts which are usual, ordinary and customary in the life of the insured, such as his work,<sup>33</sup> or usual recreation.<sup>34</sup> Note that the means, and not the result, is being tested; this is the very antithesis of the minority doctrine. Thus the minority courts are placed in the position of testing the means in one instance and the result in another. Actually, as a practical matter, it is to be doubted that death or injury could be caused by the usual and customary acts of the insured, without the addition of any unforeseen or unexpected event, or without the concurrence of a disease sufficiently serious to bar recovery under the applicable prohibitory provision of the policy.

The minority position of testing the result rather than the means might possibly be justified in theory. Assuming an accidental (*i.e.*, unforeseen, unintended and unusual<sup>35</sup>) result, and postulating no contributing disease, then at least one of the concurring causes must also have been accidental. In other words, the intentional acts or elements must have combined with some element which was accidental in order to bring about a result which was accidental. (If all causes are intentional, it necessarily follows that the result must also be intentional; thus if the result is accidental, then one cause at least must also have been accidental.) Under this approach, the problem would then resolve itself into the question of how much weight should be given this accidental factor. The fact that the result was accidental would then superficially justify a finding that this elusive accidental factor was a sufficiently important concurring cause to be the proximate cause of the injury or death. This would also justify sending the case to the jury as a question of fact—which in itself explains what may otherwise seem incongruous. Under this approach, if valid, the terms of the policy would be fully complied with, as the death or injury would have been effected by accidental means.

In the opinion of the writer, this syllogistic approach leads to the

<sup>32</sup> See *infra* notes 33 and 34.

<sup>33</sup> *Crowell v. Sunset Cas. Co.*, 21 Wn.(2d) 238, 150 P (2d) 728 (1944). The insured worked as a fireman in a steam plant. During a particularly hard day, he collapsed and died as the result of coronary thrombosis. Judgment for the beneficiary reversed upon appeal.

<sup>34</sup> *Hodges v. Mut. Benefit Health and Accident Ass'n*, 15 Wn.(2d) 699, 131 P.(2d) 937 (1942). The insured, a construction worker, suffered a heart attack while engaging in his favorite recreation, dancing, and died. Judgment for the beneficiary reversed on appeal.

<sup>35</sup> See note 14 *supra*.

doctrine of proximate causation which, if properly applied, would rule it out.<sup>36</sup> In the usual case of this type, it is amply demonstrated that known causes obtain the result. It is not often that courts discard such causes in order to attribute a result to a cause which is unknown. This approach apparently was not raised in any of the cases but it seems inherent in the minority view.<sup>37</sup>

The majority of courts distinguish between "accidental death" and "accidental means which cause death." Their approach is first to separate the cause or causes from the result and then to ascertain if the cause or causes were really accidental. Thus, while a result such as death may be accidental because unforeseen, unexpected, *et cetera*, the acts of the insured which cause the result may not fall within that definition. (For the purposes of this comment, such acts or causes shall be called "intentional.") This is illustrated by the so-called "sunstroke cases,"<sup>38</sup> in which the insured, a healthy, normal individual, has exposed himself to the sun and suffered a fatal sunstroke. By the modern view, the cause of death was the intentional exposure to the sun and thus does not come within the coverage of a policy which provides for payment when the death is the result of accidental means.<sup>39</sup> However, if while doing an intentional act, something unforeseen and unexpected occurs which operates to bring about the injury or death, the result will be deemed effected by accidental means and the policy will cover it.<sup>40</sup> This is analogous to the doctrine of intervening cause in tort law.<sup>41</sup> For example, if the insured were cranking his car and

<sup>36</sup> 50 C. J., PROXIMATE CAUSE (1930) 836 to 842; II TORTS RESTATEMENT (Official Draft 1934) §§ 431, 433.

<sup>37</sup> See VANCE, *op. cit. supra* note 1 at 879.

<sup>38</sup> COUCH, *op. cit. supra* note 2; Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491, 78 L. ed. 934, 54 Sup. Ct. 461, 90 A. L. R. 1382 (1933). The decisions are collated in 17 A. L. R. 1197 (1922) with the comment that the slight weight of authority is that sunstroke suffered unexpectedly is within the coverage of a policy insuring against death by external, violent and accidental means. VANCE, *op. cit. supra* note 1, in the footnotes at 876, states those cases hold that the unknown factor is the weakened state of the bodily organism which suffers an unexpected injury when exposed to unusual heat. The recent trend of the decisions, backed by the authoritative Landress cases, seems to be *contra*, however. The Washington court cites the Landress case with favor in the Evans case (at 566), and thus it would seem that in view of both the Crowell case, *op. cit. supra* note 35, and the Evans decision, sunstroke in Washington would not be covered as death by accidental means. Thus, as pointed out in the text, seems the more logical view.

<sup>39</sup> *Ibid.*

<sup>40</sup> 5 COUCH, *op. cit. supra* note 2, at 4203.

<sup>41</sup> II TORTS RESTATEMENT § 441; see also § 440, "Superseding Cause."



died, the death would not be covered; but if, while he was cranking, the brakes released or he slipped and fell and so died, the death would be covered.<sup>42</sup> This, in fact, would seem to be in agreement with the popular conception of the accident policy. Such a policy, it is to be remembered, is not designed to indemnify for death, no matter how caused, but only for death brought about by causes which are in themselves accidental.

(b) Whether the act or event to be examined is accidental or not is a question of fact and presents one of the most difficult problems in the field of accident insurance law. The decision in each case will necessarily be governed by the peculiar fact situation before the court; and the number and variety of situations that may be presented are bounded only by the limits of human experience. Since the Washington court has adopted the majority view, the remainder of this analysis will be primarily directed toward that view. However, much of what will be said pertains to both doctrines.

An operating force or cause purely external to the control and intent of the insured is clearly accidental; while a cause entirely within such control and intent is clearly intentional—*i.e.*, not accidental. Thus the extremes are located; “completely accidental” being the one extreme and “completely intentional” the other. Each factual situation will fall somewhere between. No line can be drawn between these two extremes with any degree of exactness which would allow a factual situation to be placed definitely either on one side of the line or the other. Few events can be so particularly defined as not to contain elements of both the known and the unknown.

The writer suggests that the problem may best be approached by (1) segregating each contributing cause or factor; and (2) determining which, if any, of the factors are accidental<sup>43</sup>—*i.e.*, outside the control and intent of the insured. The problem then becomes similar to a determination of proximate cause. Counsel must determine not only the emphasis to be given each factor; but also, the effect of the concurrence of factors upon (1) each other, and (2) the particular result.<sup>44</sup> Of especial aid in the determination of emphasis will be prior

<sup>42</sup> Preferred Accident Ins. Co. v. Patterson, 213 Fed. 595 (C. C. A. 3d, 1914), 44 Ins. L. J. 397.

<sup>43</sup> See note 14 *supra*.

<sup>44</sup> For example in the sunstroke cases, it would seem that the separated causes of death would be:

insurance cases within the jurisdiction. This rule of thumb should also help; the further the primary or substantial cause of the result is beyond the control and intent of the insured, the more likely the court will be to construe such result to have been effected by accidental means. In other words, the more chance that the insured has to prevent the result, the less chance his beneficiary will have to collect.

### III.

#### EFFECT OF PRE-EXISTING DISEASE

Although the factors of accidental means and pre-existing disease or physical condition are here treated separately, in the usual case both elements are present. It is thus important to distinguish and examine them, and then to determine the effect, if any, of their integration.

The usual accident policy provision in regard to disease reads much like that involved in the *Evans* case; "and death shall not have been caused or contributed to directly or indirectly, or wholly or partially, by disease, or by bodily or mental infirmity" The *Evans* court adopted the most logical approach in interpreting this clause by determining whether the physical condition or disease was a contributing cause or merely a condition upon which the misfortune operated. Courts seem to disregard "wholly or partially," "directly or indirectly" and like phrases. They uniformly hold that recovery will be barred only if the disease bears a causal connection to the result.<sup>45</sup> A contrary holding would allow an unjustifiable delimitation upon the scope of liability. It would conceivably make it possible for any physical disability, sufficiently serious to be called such, to bar recovery, no matter how slight its effect upon the result.<sup>46</sup> The courts have as yet been unwilling so to hold.

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(1) the voluntary exposure of the insured to the sun,

(2) the heat of the sun, and

(3) any inherent susceptibility of the insured to heat.

(1) would be clearly non-accidental; (2), in conjunction with (1), would seem to be non-accidental also; (3) if actually unknown to the insured, and given sufficient weight by the court, could conceivably be construed as transforming the combination of the three into being accidental. However, logically, if that much weight is given the third factor, then it must necessarily come within the prohibitory disease provisions of the policy and recovery must be denied on that ground.

<sup>45</sup> 6 COOLEY'S BRIEFS ON INSURANCE, *op. cit. supra* note 28, at 5352.

<sup>46</sup> Such is the feared result in the dissent of Mr. Justice Cardozo in *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U. S. 491, 78 L. ed. 934, 54 Sup. Ct. 461, 90 A.

The determination whether a disease is to be construed as a cause or as a condition would seem to be based upon: (1) the seriousness of the disease, and (2) the significance of its contribution to the death or injury.<sup>47</sup> If the disease is serious and plays a substantial role in effecting the result, the court is more likely to construe it as a concurring cause and so bar recovery. However, this does not always follow. Both factors may be substantial and yet the court hold the disease to be a condition, "even though necessary to the result."<sup>48</sup> Note that an entirely different question is presented when the accident causes a disease which in turn causes the death; the policy covers this situation.<sup>49</sup> Whether a disease or physical condition is of a sufficiently settled and significant character to come within the policy meaning of disease<sup>50</sup> constitutes a preliminary question, which, upon affirmative determination, poses the crucial question. What relation does such disease have in producing the result? It is very possible, for example, that a very serious heart ailment may have existed and yet have made no causal contribution to death.

The analysis of this problem also may best be presented by resolving it into a question of degree. The terms "efficient" and "non-efficient" will be used to denote the extremes. A disease to be an "efficient" factor must be sufficiently serious and must play such a substantial role in obtaining the result that the courts will view it as a concurring cause. On the other hand, if the disease,<sup>51</sup> although coming within the

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L. R. 1382 (1933), cited *supra* note 38. The same fear is voiced by Justice Connelly in his dissent in the *Evans* case.

<sup>47</sup> It is simple to see how (1) could occur without the occurrence of (2), or (1) and (2) together, but it seems inherently impossible that (2) could occur alone.

<sup>48</sup> *Evans v. Metro. Life Ins. Co., et al.*, 126 Wash. Dec. 557, 578, 174 P (2d) 961, 974 (1946), cited *supra* note 6; *Hill v. Great Northern Life Ins. Co.*, 186 Wash. 167, 57 P.(2d) 405 (1936); *Pierce v. Pac. Mut. Life Ins. Co. of Calif.*, 7 Wn.(2d) 151, 165, 109 P.(2d) 322, 328 (1941), *Kearney v. Wash. Nat. Ins. Co.*, 184 Wash. 579, 52 P.(2d) 903 (1935)

<sup>49</sup> *Hanley v. Occidental Life Ins. Co.*, 164 Wash. 320, 2 P (2d) 636 (1931); *Hemrich v. Aetna Life Ins. Co.* 186 Wash. 652, 63 P (2d) 432 (1936), *Kane v. Order of Commercial Travelers*, 3 Wn.(2d) 355, 100 P.(2d) 1036 (1940), cited *supra* note 19.

<sup>50</sup> *Evans v. Metro. Life Ins. Co., et al.*, 126 Wash. Dec. 557, 582, 174 P (2d) 961, 976 (1946), cited *supra* note 27.

<sup>51</sup> Disease as herein used includes not only ailments produced by bacteria (which is the normal definition), but also physical disabilities.

policy meaning,<sup>52</sup> is not sufficiently serious<sup>53</sup> to play a substantial causal role, and thus is held to be a mere condition, it must be termed "non-efficient." For example, the mere exertion of a normally healthy person in pulling a rowboat from the water will cause him no serious injury. However, if his heart is in such condition that the exertion causes death, the heart ailment is not merely a necessary condition but a contributing cause, and, as such, should bar recovery.<sup>54</sup>

Apparently, knowledge by the insured of his poor physical condition merits little consideration in this type of policy.<sup>55</sup> When elicited, however, this fact may possibly have a slight adverse effect upon the jury—especially if argued in connection with the definition of "accidental."

#### IV

#### CONCLUSION

Each case would thus seem to be a question of comparative analysis. Actually, according to the most logical construction of the insurance contract, two separate factors are presented. (1) whether the means or causes were accidental, and (2) whether the disease or physical condition was such as could be termed "efficient"—*i.e.*, was it a cause or a condition in relation to the result? An affirmative holding as to either may be utilized by the insurer to deny recovery. As a practical matter, however, it will be necessary to determine the court's probable reaction to a given case which includes elements of both factors. Each of these factors bears significance not only in its status as a separate and definite requirement, but also in its relative effect upon the other. This latter effect may be stated: The more the cause tends to be intentional, the less efficient need the disease be in order to bar recovery. In other words, the efficiency of the disease is directly proportional to the fortuity of the means. The converse would also be true: The more the operating force tends toward being accidental, the more efficient the disease must be in order to deny liability. This suggested

<sup>52</sup> Otherwise the court need not concern itself with the effect of the disease. It is only when the disease or disability is of a "sufficiently settled and significant character" that the court must decide whether it is a cause or a condition.

<sup>53</sup> From an extensive review of the cases, the writer concludes there is a distinct difference in the degree of seriousness necessary to bring the disease within the *meaning* of the policy and the degree of seriousness necessary to a finding that it was a concurring cause.

<sup>54</sup> *Herthel v. Time Ins. Co.*, 221 Wis. 208, 265 N. W. 575 (1936).

<sup>55</sup> See the exhaustive list of cases in VAN AUKEN, *READY REFERENCE DIGEST OF ACCIDENT INSURANCE LAW* (1922).

rule is not without limitation, however. If either of the factors is manifestly outside the coverage of the policy, *i.e.*, clearly non-accidental or clearly efficient, *a fortiori* at least, no recovery should lie.

The factor of disease excluded, a death caused by purely accidental means must be indemnified, while the contrary is true if the act or means is clearly intentional. Also, if the death is the result of disease alone, it cannot be included within the risk for which the insurer contracted to be liable. In these situations there is no problem of interrelation. Where this occurs, there are four basic fact patterns which, if noted, are very helpful in attempting to determine the probable outcome of a case. The innumerable gradations between must be tested by the proportion rule above outlined.

(1) If the active operating force or cause is purely external to the control and intent of the insured (and therefore accidental), and it operates upon an efficient disease or physical condition, then in the great majority of cases it is left to the jury to decide whether the disease is a contributory cause that would bar recovery, or a condition that would allow it. In view of the natural tendencies of juries in cases of this kind, the disease is usually found to be a condition. The court then terms such disease, "a condition necessary to the result."<sup>56</sup> This approach is borne out by the Washington decisions and explains the difference between the *Pierce* and *Evans* cases.<sup>57</sup>

<sup>56</sup> See note 48 *supra*.

<sup>57</sup> *Kearney v. Wash. Nat. Ins. Co.*, 184 Wash. 579, 52 P (2d) 903 (1935), cited *supra* note 48. The facts showed that the insured had suffered from eye trouble for a period of ten years or more and had only 20 per cent vision in one eye. After a fall down a flight of stairs in which he struck his head, he became blind. The expert testimony was in dispute as to whether the fall or the condition of the eyes caused the blindness, and the jury found it to be the fall. Recovery was allowed, the injury being held the result of accidental means.

*Hill v. Gr. Northern Life Ins. Co.*, 186 Wash. 167, 57 P.(2d) 405 (1936), cited *supra* note 48. In the same type policy, it was held to be a question of fact for the jury whether the death of the insured by cerebral hemorrhage was due to an automobile collision or an existing coronary condition. Recovery allowed.

*Pierce v. Pac. Mut. Life Ins. Co. of Calif.*, 7 Wn.(2d) 151, 109 P.(2d) 322 (1941), cited *supra* note 48. The insured suffered from arteriosclerosis and high blood pressure and sustained severe fright when almost involved in an automobile collision. The shock resulted in a stroke and partial paralysis. As to the cause of the stroke, there were two conflicting medical theories between which the jury could choose. Recovery was allowed.

*Graham v. Police & Firemen's Ins. Assn.*, 10 Wn.(2d) 288, 116 P.(2d) 352 (1941) The insured died of coronary thrombosis following a fall down the basement stairs as he rushed to the aid of his daughter whose clothes had caught on fire. He had an existing heart condition which had manifested itself on more than one occasion. The evidence was sufficiently conflicting to go to the jury, which

(2) If the accidental force operates upon a non-efficient disease or disability, *i.e.*, a pure condition, recovery is uniformly allowed in both the majority and minority jurisdictions. The disease or physical disability, being non-efficient, is a factor which merits little consideration by counsel, although, of course, it is still an issue presented to the jury<sup>58</sup>

(3) If the active operating force is intentional (*i.e.*, non-accidental), because within the control and intent of the insured, and if it operates upon an efficient disease, it would seem clear that there can be no recovery—and this upon two separate grounds; (a) the death was not caused by accidental means, and (b) a disease was a substantial contributing factor to the result. This is the present Washington rule.<sup>59</sup>

(4) The same result should *a priori* follow if the intentional act operates upon a non-efficient disability or disease, causing the injury or death. Here as in (2), the issue of disease would not control, but the intentional character of the act should deny recovery<sup>60</sup>

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found that the disease was a mere "contributory factor" and that the proximate cause of the death was the fall.

<sup>58</sup> *Hemrich v. Aetna Life Ins. Co.*, 186 Wash. 652, 63 P (2d) 432 (1936), cited *supra* note 49. The instruction to the jury was held proper when it in effect stated that if the accident set in motion some latent physical defect, then the insured died as the result of accidental means. The insured had broken his leg while walking and died from thrombosis of a pulmonary artery, the thrombus or blood-clot having originated in the region of the fracture. Recovery was allowed.

*Kane v. Order of United Comm. Travelers*, 3 Wn.(2d) 355, 100 P (2d) 1036 (1940), cited *supra* note 49. The insured received injuries from an accidental fall which aggravated an existing hernia and necessitated a surgical operation. While recuperating, he contracted lobar pneumonia from which he died. Recovery allowed.

<sup>59</sup> *Hodges v. Mut. Benefit Health & Accident Ass'n*, 15 Wn.(2d) 699, 131 P (2d) 937 (1942), see note 34 *supra*. *Crowell v. Sunset Cas. Co.*, 21 Wn.(2d) 238, 150 P (2d) 728 (1944), see note 32 *supra*. In the *Evans* case, the intentional over-exertion of the insured, in connection with a pre-existing heart ailment, caused death. This was held not to be by accidental means, and recovery was denied. This case overruled the *Horsefall* case, where the insured died from dilation of the heart a few days after lifting a heavy iron bar from an awkward position and recovery was allowed as death was caused by accidental means. The more recent *Bennett* case was also overruled. There the insured, a powerful man and a member of the Yakima fire department, died from a herniatic swelling in the groin after lifting a heavy ladder during a demonstration before a class of new men. He died during a subsequent operation but it was expressly found that nothing during the operation caused his death. There, too, the court held without a dissenting vote, that this was death by accidental means. The case was remanded, however, because of an error in instructions.

<sup>60</sup> There are no Washington cases on this point. But see *VAN AUKEN, op. cit. supra* note 55.

Under this analysis, the factor of disease seems effectively excluded. However, the insurer may still attempt to convince the jury that the disease or disability was so important to the resultant death or injury that it must have been a concurring cause, and that recovery must be denied.<sup>61</sup> The cases do not lack instances of such findings.<sup>62</sup>

It must be emphasized that the above four situations are concerned with clear cases where, from a perusal of the facts, it can reasonably be said that the operating force is either intentional or accidental and that the disease is either efficient or non-efficient in causing the result. The myriad of degrees between accidental and intentional means and between efficient and non-efficient diseases present the difficulty in this problem. Each case proffers a new and singular factual pattern. The analyses advanced herein, it is submitted, in combination with the normal rules of construction applicable to insurance contracts, will be of aid in determining the probable outcome of a suit of this nature. The two primary rules are, first, to construe ambiguous provisions in favor of the insured, and second, to interpret language of the policy in light of the use and understanding of the ordinary man.<sup>63</sup> A *caveat* must be added in regard to the effect of sympathetic juries and the understandable attitude of courts toward insurers who draw their policies so strictly as to inspire the saying that if an insurance policy were strictly interpreted, no one could ever recover. Actually, this explains the attitude of the minority courts. They feel that there is an unjustifiable attempt by the insurer, in the delimitation of his risk, to make recovery the rare exception.<sup>64</sup> They feel that insurers should

<sup>61</sup> Even in the *Evans* case, the jury found that the heart trouble of the insured was not a concurring cause.

<sup>62</sup> *Bush v. Order of United Commercial Travelers of Amer.*, 124 F.(2d) 528 (C. C. A. 2d 1942) The insured, apparently in robust good health stepped out of a rowboat onto some rocks and jarred himself slightly. The jar loosened a blood-clot which lodged in a muscle of the heart and caused his death. Directed verdict for the defendant insurer. Affirming opinion by Justice Augustus Hand, dissent by Justice C. E. Clark. For further cases see VAN AUKEN, *READY REFERENCE DIGEST OF ACCIDENT INSURANCE LAW*, *op. cit. supra* note 54.

<sup>63</sup> *Zinn v. Equitable Life Ins. Co.*, 6 Wn.(2d) 379, 107 P (2d) 921 (1940)

<sup>64</sup> See *Kane v. United Order of Comm. Travelers*, 3 Wn.(2d) 355, 100 P (2d) 1036 (1940), cited note 58 *supra*. The restrictive provisions of the policy read, "nor shall the order be liable (for losses) resulting from war or riot, riding or driving a motor vehicle in a race, fighting, violation of any law, intentionally self-inflicted injuries (fatal or otherwise), self-destruction (while sane or insane), murder or disappearance, injuries intentionally inflicted by others, resulting in death, or from voluntary exposure to unnecessary danger, or for over-exertion (unless in effort to save human life), or medical, mechanical or

not be allowed to solicit policies and collect premiums and then, by such technical means, escape liability for their advertised coverages. Nor do the majority courts transcend this attitude completely; they merely accord it lesser moment.

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surgical treatment (except where the surgical treatment is made necessary by the accident), nor for any accident (fatal or otherwise), to a member who is in any degree under the influence or in consequence of having been under the influence of intoxicating liquor, alcohol or narcotic.

"Nor for            appendicitis, fits, epilepsy, mental infirmity, ivy poisoning, ptomaine poisoning, or other poisoning, bite or sting of an insect or any infection (unless the infection is introduced into, by or through an open wound which open wound must be caused by external, violent and accidental means and be visible to the unaided eye), inhaling of manufactured or natural gas, carbon monoxide poisoning, hydrogen or any other form of gas causing asphyxiation (voluntary or involuntary, conscious or unconscious), venereal disease, cerebral hemorrhage, spinal hemorrhage, heat prostration, sunstroke or sunburn."